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VISA U.S.A. INC.

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 VISA U.S.A. INC.,

14 Plaintiff,

15 vs.

16 MARITZ INC., d/b/a MARITZ  
LOYALTY MARKETING,

17 Defendant.  
18  
19

Case No. CV-07-5585 JSW

**PLAINTIFF VISA U.S.A. INC.'S  
OPPOSITION TO DEFENDANT MARITZ'S  
EX PARTE APPLICATION FOR AN ORDER  
SHORTENING TIME OR IN THE  
ALTERNATIVE FOR A TEMPORARY  
STAY OF THE ARBITRATION**

Plaintiff Visa U.S.A. Inc. (“Visa”) opposes Defendant Maritz Inc.’s (“Maritz”) *ex parte* application for an order shortening time for the hearing on its motion to stay arbitration or in the alternative for an order temporarily staying the arbitration. Maritz will suffer no cognizable prejudice by conforming to the Court’s previously established briefing and hearing schedule. Maritz’s assertion that it will be prejudiced by having to proceed with arbitrator selection before the hearing on its motion is illogical and unsupportable. Proceeding with the process of arbitrator selection will neither prejudice Maritz nor “usurp” the Court of jurisdiction. On the other hand, moving the hearing up to January 11, the same day as Visa’s opposition memorandum will be filed, would obviously prejudice Visa and the Court. Further, granting Maritz the very relief sought by its motion to stay without any consideration of the merits of the motion would be unprecedented. Maritz’s ill-advised *ex parte* application should be denied.

#### **I. SUMMARY OF FACTS**

This action and the related AAA arbitration arise out of Maritz’s breaches of its contractual obligation to develop and deliver a time-critical rewards program to Visa. After six months of delays, Visa terminated Maritz in April 2007, and disputes arose regarding the parties’ respective claims under that contract. On July 9, 2007, Visa and Maritz entered a written Letter Agreement to resolve their “respective claims for damages resulting from alleged breaches” of that contract and all “related claims” outside of Court, utilizing negotiation, followed by mediation and culminating in “binding arbitration pursuant to AAA Commercial Rules.” (*See* Declaration of Ryan S. Hilbert In Support of Maritz’s Motion To Stay Arbitration Pending Determination Of Arbitrability (“Hilbert Motion To Stay Decl.”), Ex. D.)

On November 2, 2007, Visa filed a demand for arbitration with the American Arbitration Association (“AAA”) and this action to compel arbitration. Maritz has responded with a series of letters to the AAA arguing that the arbitration should not proceed, asserting that the AAA lacks jurisdiction. (*See* Hilbert Motion To Stay Decl., Exs. G and I). On November 30, the AAA informed the parties that, after carefully reviewing the parties’ positions, it had determined that the filing requirements had been met; with that November 30 letter, the AAA provided the parties with a list of potential arbitrators and directed that each party submit its Arbitrator Selection Lists,

1 ranking and striking candidates, by no later than December 17, 2007.<sup>1</sup> On December 13, after  
 2 Maritz sent several more letters to the AAA (including to its General Counsel in New York),  
 3 repeating the same jurisdictional arguments, the AAA again advised that it had considered all of  
 4 the correspondence and would proceed with the arbitration according to its Rules. (Hilbert  
 5 Motion to Stay Decl., Ex. K)

6 On December 20, 2007 the AAA rejected Maritz's contentions that the arbitration be  
 7 moved from San Francisco to St. Louis and directed the parties to proceed with arbitrator  
 8 selection by no later than January 4, 2008. (*See Declaration Of Ryan S. Hilbert In Support Of Ex*  
 9 *Parte Application By Maritz Inc. For An Order Shortening Time Or, In The Alternative,*  
 10 *Temporarily Staying Arbitration ("Hilbert Ex Parte Decl."), Ex. C.) On the same day (December*  
 11 *20), after it learned that the arbitration would not proceed in its preferred (St. Louis) venue,*  
 12 *Maritz filed with this Court its Motion to Stay Arbitration Pending Determination of Arbitrability*  
 13 *and a 40-page Answer and Counterclaim. The Court issued its scheduling order the next day*  
 14 *(D.E. #22), setting Maritz's motion for hearing (if necessary) on February 8, and fixing January*  
 15 *11, 2008 as the date for Visa's opposition and January 18 for Maritz's reply.*

16 On December 26, 2007, Maritz sent another letter to the AAA, attaching the Court's Order  
 17 and arguing that the mere pendency of its motion to stay justified the same relief—a stay of the  
 18 arbitration proceeding—that the AAA had already twice rejected. (*See Hilbert Ex Parte Decl.,*  
 19 *Ex. D.) In a separate letter dated December 28, 2007, Maritz made a request to further extend the*  
 20 *time to submit the arbitrator selection lists until February 18, 2008, ten days after the potential*  
 21 *February 8 hearing. (Id., Ex. F.) On January 2, 2008 the AAA for a third time rejected Maritz's*  
 22 *request for a stay, but did extend the date for submission of the arbitrator selection by another*  
 23 *week until January 11, 2008. (Thompson Decl., Ex. B.) Maritz filed its ex parte application later*  
 24 *that evening.*

25  
 26  
 27 <sup>1</sup> Although Maritz attached the voluminous correspondence with the AAA to the declaration supporting its  
 28 motion to stay, it omitted this November 30 letter that commenced the arbitration selection process. A true  
 and correct copy of the AAA's November 30, 2007 letter is attached as Ex. A to the Declaration of  
 Roderick M. Thompson ("Thompson Decl.").

1 **II. ARGUMENT**

2 **A. Maritz's *Ex Parte* Application Should Be Denied Both Because Maritz Cannot**  
 3 **Show That It Will Suffer Any Prejudice And Because Maritz Has Delayed In**  
 4 **Making Its Request.**

5 Preliminarily, Maritz's *ex parte* motion seeking to "temporarily stay the arbitration  
 6 proceeding" is procedurally defective. Local Rule 7-10 both states that an *ex parte* motion may  
 7 be filed "**only** if a statute, Federal Rule, local rule or Standing Order authorizes the filing of an *ex*  
 8 *parte* motion" and requires that the motion "**must** include a citation to the statute, rule or order  
 9 which permits the use of an *ex parte* motion to obtain the relief sought." (Emphasis added.)  
 10 Maritz fails to cite any such statute, rule or order which permits the use of an *ex parte* motion to  
 11 obtain the temporary stay relief sought as required by Civil L. R. 7-10.<sup>2</sup> Its *ex parte* application  
 12 should be denied on that basis. See *In re Intermagnetics Am.*, 101 B.R. 191, 192 (C.D. Cal. 1989)  
 13 (Ex parte applications "are nearly always improper").

14 In any event, Maritz cannot meet the requisite standard to prevail on an *ex parte*  
 15 application,

16 First, the evidence must show that the moving party's cause will be  
 17 irreparably prejudiced if the underlying motion is heard according to  
 18 regular noticed motion procedures. Second, it must be established that  
 19 the moving party is without fault in creating the crisis that requires *ex*  
 20 *parte* relief, or that the crisis occurred as a result of excusable neglect.

21 *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal. 1995).  
 22 Maritz has failed to satisfy either requirement.

23 1. Maritz Has Not – And Cannot – Demonstrate That It Will Suffer Any  
 24 Prejudice If The Motion Is Heard On February 8

25 Maritz has asked the Court either to reset the hearing on Maritz's motion to stay to no later  
 26 than January 11, 2008, or to order a temporary stay of the arbitration until Maritz's motion to  
 27 stay is heard. Maritz claims that action is necessary because it will be prejudiced if forced to  
 28 proceed with arbitrator selection in the interim. Maritz does not show how or why it would be  
 prejudiced if the Court does not grant *ex parte* relief.

<sup>2</sup> Maritz states that its *ex parte* motion is brought "pursuant to Civil Local Rules 6-3, 7-10 and 7-11." Local Rule 6-3 applies only to motions to enlarge or shorten time while Local Rule 7-11 applies only to "miscellaneous administrative matters." Neither provides any basis for Maritz's extraordinary demand that the Court stay, based upon Maritz's *ex parte* application, the pending arbitration.

1 Maritz argues vaguely that “each day the arbitration proceeding is allowed to proceed . . .  
 2 is another day Maritz risks having the AAA make an irrevocable decision on important  
 3 procedural matters.” (*See* Maritz’s *Ex Parte* Application for Order Shortening Time or Staying  
 4 Arbitration “Maritz *Ex Parte* Application”, pp. 4:26-5:1.) Yet Maritz does not identify how the  
 5 AAA arbitrator selection process would harm Maritz in any way between now and when the  
 6 Court rules on Maritz’s motion to stay. Far from showing that it would be “irreparably  
 7 prejudiced” if the pending motion is not heard until February 8, Maritz has made no showing of  
 8 any prejudice whatsoever.

9 Maritz first received notice of the selection procedure and the resumes for the ten potential  
 10 arbitrators on November 30. (Thompson Decl., Ex. A.) Under the AAA Rules, “each party to the  
 11 dispute shall have 15 days from the transmittal date in which to strike names objected to, number  
 12 the remaining names in order of preference, and return the list to the AAA.” (Thompson Decl.,  
 13 Ex. C, Rule 11). Accordingly, the November 30 letter initially set December 17 as the response  
 14 date. Maritz’s many letters and complaints to the AAA have delayed this date until January 11,  
 15 2008. The result is that Maritz already will have had 44 days, almost three times the normal 15-  
 16 day period to submit its strikes. It has had more than ample time to evaluate the candidates, and  
 17 will suffer no conceivable prejudice from proceeding to pick an arbitrator.

18 Nor can Maritz show that it would suffer prejudice, or indeed any harm whatsoever,  
 19 assuming that an arbitrator is selected before the Court’s scheduled hearing on the stay motion.  
 20 Selecting an arbitrator less than one month before the scheduled hearing on its motion does not  
 21 create a likelihood of inconsistent rulings. A few weeks is insufficient time for any ruling by the  
 22 arbitrator on the merits of the parties’ disputes. Maritz speculation that such a ruling is “quite  
 23 possible” (*See* Maritz’s *Ex Parte* Application, p. 4:13) is unsupported and unsupportable.

24 Visa, by contrast, would be prejudiced if Maritz’s motion were heard on January 11. As  
 25 Maritz of course knew when it made its request, the Court’s December 21 Scheduling Order set  
 26 that date -- this Friday, January 11 -- as the deadline for Visa to file its opposition to Maritz’s  
 27 motion. Visa has been planning accordingly, and will demonstrate why the requested stay is not  
 28 procedurally or substantively supportable in its opposition to be filed that day. If Maritz wishes

1 to forego its reply or if the Court wishes to set an earlier hearing date, Visa would have no  
2 objection. But a hearing on or before January 11, 2008 is not practicable or justifiable.

3 Moreover, Maritz's alternative request that the Court grant as a temporary matter the very  
4 relief sought by Maritz's underlying motion, a temporary stay of the arbitration, is wholly  
5 unjustified. Maritz has failed to show any prejudice it would suffer by allowing the Court to  
6 consider its motion with full briefing and argument. A stay of the arbitration process, on the other  
7 hand, will further frustrate Visa's contractual entitlement to an efficient dispute resolution  
8 process.

9 2. To The Extent There Is Any "Crisis" Supporting Maritz's Request,  
10 Maritz's Own Conduct Has Caused That "Crisis."

11 Moreover, to the extent there is any claimed "crisis" justifying Maritz's extraordinary  
12 request, that "crisis" is entirely of Maritz's own making. The arbitration began on November 2.  
13 From that date until December 20 Maritz did not seek relief from this Court of any kind, despite  
14 the fact that the arbitration proceeding was progressing all the while. Maritz offers no  
15 explanation for its failure to act sooner. Indeed, that Maritz waited to file its motion to stay until  
16 after the AAA ruled that the hearing will be in San Francisco, not St. Louis (*See Hilbert Ex Parte*  
17 *Decl., Ex. C*), suggests that Maritz's real complaint is with the arbitral venue, not the arbitration  
18 process. Regardless, Maritz waited for two months until January 2, 2008 to seek its *ex parte*  
19 relief, plainly contributing to the supposed "crisis" it now confronts.

20 **III. CONCLUSION**

21 Maritz cannot show that it will suffer any prejudice by leaving its motion set for hearing  
22 on February 8, 2008. Visa respectfully requests that the Court deny Maritz's *ex parte* application  
23 for an order shortening time or in the alternative for a temporary stay of the arbitration.

24 DATED: January 7, 2008

FARELLA BRAUN & MARTEL LLP

25 By: /s/ Roderick M. Thompson  
26 Roderick M. Thompson

27 Attorneys for Plaintiff VISA U.S.A. INC.  
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